SUPREME COURT, U. S.

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FILED
MAY 10 1974
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM 1973

No. 73-1311

MICHAEL PAPADOPOULOS,

Petitioner,

v.

OREGON STATE BOARD OF HIGHER EDUCATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF OREGON

PETITIONER'S REPLY BRIEF

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REPLY TO RESPONDENT'S STATEMENT OF THE CASE

The factual questions involved in this case have not been resolved contrary to petitioner's position. Rather, the facts recited by petitioner in his Petition are mirrored in Part I of the opinion of the Oregon Court of Appeals. Compare pp. 3-12 with Appendix A, pp. 31-51.

REPLY TO RESPONDENT'S REASONS FOR DENYING THE WRIT

I. The Oregon Court of Appeals did not correctly apply this Court's holdings in Board of Regents v. Roth, 408 U.S. 564 (1972) and in Perry v. Sindermann, 408 U.S. 593 (1972).

Respondent has misstated the holding of the Oregon Court of Appeals. That court did not hold "that if a property or liberty interest is established by statute *or contract* due process requires an opportunity to be heard." (Emphasis added). Brief for Respondent in Opposition, p. 2. On the contrary, the Oregon court distinguished property interests created by statute or administrative regulation from property interests created by contract; only the former were found deserving of due process protection. See Petition for a Writ of Certiorari, p. 13, 15-20.

In separate opinions filed in *Arnett* v. *Kennedy*, — U.S. —, 42 U.S.L.W. 4513 (April 16, 1974), Justices Powell and White have made statements which contradict the Oregon court's distinction. Justice Powell, explaining *Board of Regents* v. *Roth*, 408 U.S. 564 (1972), wrote:

> "In particular, the Court stated that a person may have a protected property interest in public employment if *contractual or* statutory provisions guarantee continued employment absent 'sufficient cause' for discharge." (Emphasis added) *Arnett* v. *Kennedy*, — U.S. —, 42 U.S.L.W. at 4530.

Justice White, explaining *Perry* v. *Sindermann*, 408 U.S. 593 (1972), wrote:

> "In *Sindemann*, a teacher who had held his position for a number of years but was not tenured under contract, alleged that he had *de facto* tenure *under contract law* due to 'the existence of rules *or understandings*' with the college which employed him." (Emphasis added) *Arnett* v. *Kennedy*, — U.S. —, 42 U.S.L.W. at 4536.

These explanations coincide with the more general observation, made by Justice Marshall, that the test for whether a constitutionally "protected interest has been infringed reflects . . . (a) broad concept of 'property.'" *Id.*, — U.S. —, 42 U.S.L.W. at 4522.

The Oregon Court of Appeals has applied a niggardly test for the determination of whether a property interest deserves federal due process protection. The U. S. District Court for Oregon has recently applied the broad test in *Vanderzanden* v. *Lowell School District No. 71*, 369 F. Supp. 67, 73 (D.C. Or. 1973). Hence, in Oregon the question of whether particular property interests are to be afforded federal due process protection depends on whether the case is brought in a state or in a federal court. The Oregon court's mistake should be corrected.

II. Petitioner's right to a pre-termination hearing has not been resolved against him by this Court.

Respondent claims that petitioner's right to a pre-termination hearing has been resolved against him by this Court. Respondent's reliance for such a claim on

Arnett v. *Kennedy, supra,* is misplaced. The question raised in *Arnett* was whether a three-judge federal court had erred when it held:

> ". . . that the discharge procedures authorized by the (Lloyd-LaFollette) Act and attendant Civil Service Commission and OEO regulations denied appellee due process of law because they failed to provide for a *trial-type hearing before an impartial agency official prior to removal;* . . ." (Emphasis added) *Id.*, — U.S. —, 42 U.S.L.W. at 4514.

In reversing this holding, this Court did not rule that the dismissed employee was entitled to *no* pretermination hearing of any kind. On the contrary, as Justice Powell pointed out, the dismissed employee was entitled to

> ". . . advance written notice of the reasons for his proposed discharge and the materials on which the notice is based (,) . . . (a) right to respond to the charges both orally and in writing, including the submission of affidavits (and,) (u)pon request, . . . an opportunity to appear personally before the official having the authority to make or recommend the final decision." *Id.*, — U.S. —, 42 U.S.L.W. at 4531.

Because the dismissed employee was afforded the opportunity for this kind of pre-termination hearing, the majority in *Arnett* concluded that the post-termination trial-type hearing provided did not violate federal due process. *Id.*, — U.S. —, 42 U.S.L.W. at 4519, 4520, and 4531-4532.

Petitioner makes no federal due process claim to a

"trial-type hearing before an impartial agency official prior to removal." His claim before this Court is that his employment contract and his interest in his professional reputation give rise to federal due process interests in property and in liberty, which entitle him to "some kind of prior hearing." See *Board of Regents* v. *Roth*, 408 U.S. 564 at 569-570. The right to some kind of prior hearing, once established under the federal constitution, entitles petitioner to the hearing specified by the state's Administrative Procedures Act. Oregon Laws 1957, ch. 717, § 1(2).

The significance of this point is made clear in the summary paragraph of the opinion below. In that paragraph the court concluded that, since petitioner's interest in a year's notice of termination of employment was a property interest worthy of federal due process protection, he was entitled to a pre-termination hearing on that claim. The court further concluded that

> ". . . such a hearing had to comply with the requirements of the Administrative Procedures Act, ORS ch 183; (and) . . . petitioner was not accorded a pre-termination hearing that complied with the Administrative Procedures Act." Petition for Writ of Certiorari, Appendix A, p. 80.

Petitioner's claim here is that the Oregon court failed to reach the same conclusion about his contractual employment property claims and about his liberty claims, a failure due to that court's misapplication of the *Roth* and *Sindermann* precedents.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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